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NO. 88-1823

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

RICHARD GLADDEN,

Petitioner

VS.

RANDY W. ROACH, ET AL.

Respondents

BRIEF OF MUNICIPAL RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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May 31, 1989

QUESTIONS PRESENTED

1. Does a law enforcement officer's use of physical violence and other deliberate means to compel a person to verbally disclose true name and address during the post-arrest booking process, violate the Fifth Amendment privilege against self-incrimination notwithstanding an absence of subjective intent on the officer's part to secure incriminating information?

2. Does charging a person with a criminal offense under Texas Penal Code Section 38.02 for asserting the Fifth Amendment privilege against self-incrimination after lawful arrest, and requiring a person so charged to post cash bond to ensure appearance at criminal trial on that alleged offense, unconstitutionally impose a cost on assertion of that privilege?

3. Under the case or controversy requirement of Article III, is a Plaintiff who seeks to enjoin municipally authorized enforcement of a State law which has violated his Fifth Amendment privilege against self-incrimination, required to prove standing by demonstrating he is "more likely than others" to again suffer the violation complained of by Petitioner?

LIST OF PARTIES

RICHARD GLADDEN, Petitioner

Respondents

RANDY W. ROACH (North Texas State University police officer);

JOE R. WADDILL (individually and in his official capacity as jail booking and processing lieutenant for Respondent City of Denton);

HUGH LYNCH (in his official capacity as Chief of Police for Respondent City of Denton);

CITY OF DENTON, TEXAS; and

THE STATE OF TEXAS[1]

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[1]The State of Texas is listed by Petitioner as a party, but was not a defendant in the District Court.

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(In Reply To Petitioner's Reasons I and II)

The holding of the Court of Appeals that it was not unconstitutional to require Petitioner to disclose his name after a lawful arrest does not conflict, but rather comports, with the decision of this court and with decisions of other Federal Courts Of Appeals..... 11

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(In Reply To Petitioner's Reason III)

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TO THE HONORABLE MEMBERS OF THE SUPREME COURT OF THE UNITED STATES:

Respondents, Joe R. Waddill, Hugh Lynch and the City of Denton, Texas (the Municipal Respondents, called the Municipal Defendants in the Courts below) file this Brief in Opposition to the Petition For Writ Of Certiorari.

OPINION BELOW

The opinion of the Fifth Circuit Court of Appeals is reported at 864 F.2d 1196 and is attached to Petitioner's Petition at Appendix A-1.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition For Writ of Certiorari.

STATUTES AND RULES INVOLVED

Section 1983, Title 42, United States Code provides as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

Texas Penal Code Annotated Section 38.02 (Repealed 1987) provided:

> "Sec. 38.02. Failure to Identify as Witness.
>
> "(a) A person commits an offense if he intentionally refuses to report or gives a false report of his name and residence address to a peace officer who has lawfully stopped him and requested the information."

The present version of Texas Penal Code Annotated Section 38.02 (Vernon, 1989), effective September 1, 1987, which Petitioner seeks to have Respondents enjoined from enforcing in the future, provides:

> "Section 38.02. Failure to Identify.
>
> "(a) A person commits an offense if he intentionally refuses to report or give his name, residence address or date of birth to a peace officer who has lawfully arrested the person and requested the information."

STATEMENT OF THE CASE

A. NATURE OF CASE AND DISPOSITION IN COURTS BELOW

This case is a civil rights action against eleven employees of the City of Denton, the City of Denton, and a North Texas State University police officer, arising out of numerous arrests and incidents.

A jury answered all issues in favor of Defendants. (R. p. 655-668). The District Court awarded $1.00 in nominal damages against the City. Judgement for Defendants was entered on all of the other claims.

Petitioner appealed to the Fifth Circuit Court Of Appeals on six points of error related to his arrests on April 23, 1983 and September 15, 1984. All of Petitioner's points were rejected, and

the Court Of Appeals affirmed the District Court's judgement.

Petitioner is now seeking a writ of certiorari on three points, all related to his arrest on April 23, 1983 by North Texas State University Officer Roach, and his subsequent booking at the City of Denton jail.

B. STATEMENT OF FACTS

Petitioner Admits Arrest on April 23, 1983 Was Lawful

On April 23, 1983, N.T.S.U. police officer, Randy Roach, (Roach) saw a one car accident, surrounded by a crowd. (Tr. p. 378, L.16-21; p. 381, L.16-25). Roach had arrested the driver of the car previously for unlawfully carrying a weapon and knew from past experience that the driver could be violent. (Tr. p. 382, L.2-16). Petitioner came out of the crowd and attempted to approach the

driver, who was already under arrest. (Tr. p. 383, L.21-25).

Roach explained to Petitioner that he should not approach the driver because Roach did not want the driver to become violent. (Tr. p. 384 L.1-15). Petitioner became increasingly upset and began to curse. (Tr. p. 786, L.20-25; p. 368, L.22-25; p. 387, L.1-5). Roach decided
that Petitioner was intoxicated to the point that he might endanger himself or Roach, and placed Petitioner under arrest. (Tr. p. 387, L.6-9).

Petitioner admitted that there was probable cause for Roach to arrest him for public intoxication. (R. p. 120, par. 21; Tr. p. 110, L.13-20; p. 242, L.9-15). Petitioner also admitted that City Lieutenant Waddill therefore had probable cause to book Petitioner at the

City jail, after Roach brought Petitioner to the jail. (Tr. p. 246, L.2-6).

City Not Involved In Events At N.T.S.U. Police Station

After arresting Petitioner, Roach transported him to the N.T.S.U. campus police station. Petitioner's petition contains many unsubstantiated allegations about the use of force by Roach at N.T.S.U. which have little relevance to Petitioner's claims against the Municipal Defendants. These should be addressed by Roach's attorney. However the Municipal Defendants do not agree with Petitioner's portrayal of the facts, and ask the Court to note the following facts:

Petitioner was arrested by N.T.S.U. officer Roach, who was not employed by, or supervised by, the City. (Tr. p. 238, L.5-10; p. 386, L.7-25; p. 387, L.1-9; p. 402, L.11-25; p. 403, L.1-19). No

City officer instructed or asked Officer Roach to arrest Petitioner. (Tr. p. 386-387; p. 881, L.5-25). No City officer went with Roach to the N.T.S.U. station. (Tr. p. 243, L.16-23; p. 882, L.16-25). There was no jury issue or finding as to whether Roach followed any City policy in the arrest or handling of Petitioner.

Although Petitioner claims he was beaten and physically coerced by Roach, he never saw a doctor. (Tr. p. 243, L.24-25; p. 244, L.1-15). Although he was 22 years old, the son of a lawyer, and friend of the dean's son, Petitioner never reported his alleged beating by Roach to the dean, the police, the District Attorney or anybody else. (Tr. p. 244, L.16-25; p. 245, L.1-24; Tr. p. 308, L.11-24; p. 317, L.6-25; p. 318, L.1-17). The jury did not find that Roach used any excessive force or

committed any assault upon Petitioner. (R. p. 656 and 659).

Petitioner Was Not Questioned About Any Potentially Incriminating Information

Officer Roach did not ask Petitioner his name until after they were in the patrol car on the way to the N.T.S.U. station, and later when he began booking him for Public Intoxication. (Tr. p. 299, L.17-23; Tr. p. 389, L.13-17). Petitioner refused to identify himself during booking proceedings at the N.T.S.U. station. (Tr. p. 390, L.1-20).

Roach then transported Petitioner to the City jail. (Tr. p. 395, L.7-9). During the booking procedures at the N.T.S.U. station, and at the City jail, questioning was limited to Petitioner's name, address, and identifying information. Petitioner was not asked how much he had to drink or about his

involvement in any crime. (Tr. p. 302, L.8-23; p. 451, L.3-12). Petitioner recognized that merely providing his name would not provide a basis for any criminal charge against him. (Tr. p. 247, L.1-14; p. 291, L.3-25; p. 292, L.1-19). There is no evidence of any other interrogation.

There is absolutely no evidence that Petitioner was ever arrested by any City officer on a charge of Failure To Identify, or ever again booked into the City Jail on a charge of Failure To Identify. The jury did not find that the City had a routine or practice of stopping persons to determine their identity pursuant to Section 38.02. (R. p. 668).

FIRST REASON FOR DENYING WRIT
(In Reply To Petitioner's
Reasons I and II)

The holding of the Court Of Appeals that it was not unconstitutional to require Petitioner to disclose his name after a lawful arrest does not conflict, but rather comports, with the decision of this Court and with decisions of other Federal Courts of Appeals.

Petitioner has carefully worded his first and second Questions Presented in such a way as to require the answers he wants. However, the questions are based upon imagination, not upon facts, and are questions which were not in issue in the Courts below.

There Was No Coercion By Officers

Petitioner talks about assault and physical coercion by North Texas State

University Officer Roach and, by inference, attempts to claim that his booking by the Municipal Defendants on a charge of Failure To Identify was tainted by physical coercion. The evidence presented by Petitioner fails to establish any such claim. The jury did not find that Roach assaulted Petitioner or used excessive force on Petitioner. (R. p. 656-659). No jury issue was submitted concerning excessive force or coercion by City officers and Petitioner made no objection to this omission. (Tr. p. 1059-1062). Where the omission of an issue is not objected to, it is waived. John R. Lewis Inc. v. Newman, 446 F.2d 800 (5th Cir. 1971); Ribeiro v. United Fruit Co., 284 F.2d 317 (2nd Cir. 1960, cert. denied 365 U.S. 872).

Even assuming that requests for identification by Officer Roach or by

Lieutenant Waddill could somehow be termed "coercion" (which Respondents deny) the question must be asked: coercion to do what? Coercion to identify himself so the jailer would know who was in the jail when parents or friends made inquiries? Coercion to give his name and address, so the jailer would be able to identify him to a doctor in the event he became ill? (See testimony of Lt. Waddill as to reasons he needed names of prisoners booked in his jail at Tr. p. 542, L.16-25; p. 543, L.1-15). Only the most farfetched imagination could define requesting such information as "unlawful coercion."

There Is No Constitutional Right To Muteness

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against

himself...." This has been described with the catch-phrase "right to silence." Miranda v. Arizona, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966). Petitioner makes a quantum leap from this short-hand rendition of the Fifth Amendment to a new "right to be absolutely mute." Petitioner cites no authority for the "right to muteness" and fails to distinguish the cases which hold to the contrary.[1]

A suspect may be compelled to speak for purposes of providing a voice exemplar. United States v. Dionisio, 410 U.S. 1, 35 L.Ed. 2d 67, 93 S.Ct. 764 (1973). A person may not only be required to speak, but may also be

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[1]The District Court's opinion, found at p. B2 through B9, Petition For Writ Of Certiorari, concisely sets out the rationale and the cases supporting its decision rejecting Plaintiff's novel argument.

required to stop and give his name and address after being involved in an accident. California v. Byers, 402 U.S. 424, 29 L.Ed. 2d 9, 91 S.Ct. 1535 (1971).

Petitioner in the present case has argued that being compelled by statute to identify himself, after being lawfully arrested, violated his Fifth Amendment rights against self-incrimination. However the court in Byers recognized that an organized society imposes burdens on its members, some of which may result in criminal prosecution. "[T]he mere possibility of incrimination is insufficient to defeat the strong policies in favor of disclosure called for by statutes like the one challenged here." Byers, 404 U.S. at 428, 29 L.Ed. 2d at 17.

Petitioner's claims in the present case are even weaker than those raised in

Byers. If a driver speeds from the scene of an accident and fails to leave his name and address, it is far less likely he will be caught or prosecuted. Where Petitioner admits he is already lawfully under arrest, what element of self-incrimination is there in providing the jailer with name and address? The jailer needs such information if a prisoner becomes ill or if parents or a lawyer call inquiring as to whether a person is in custody.

Not only can a person be compelled by threat of punishment to speak and to give his name and address, he can be compelled to sign his name to an authorization for the release of bank records. Doe v. United States, 487 U.S. _____, 101 L.Ed. 2d 184, 108 S.Ct. 2341 (1988). In Doe the suspect was subject to the coercion of a jail sentence for contempt of court

for failing to sign an authorization to obtain evidence against him. In the present case, Petitioner faced, at most, a fine of $200.00 for failing to give his name and address to the booking officer after being arrested on another charge.

Petitioner's argument for a "right to be mute" ignores the fact that before there can be a violation of the Fifth Amendment there must be a "testimonial communication". Doe v. United States, 101 L.Ed. 2d at 195-196. In Doe the execution of the consent form would be coerced and could be assumed to be incriminating. 101 L.Ed. 2d at 195. Nevertheless, signing the form in question was held to be essentially a neutral act and did not relate a factual assertion or disclose information.

Blood samples, fingerprinting, handwriting, voice exemplars, standing in

a lineup, and wearing particular clothing may all be compelled even though they may obviously result in confirmation that a suspect actually committed a crime. See Doe, 101 L.Ed. 2d at 197. Petitioner never explains how merely providing his name and address could ever conceivably incriminate him.[1] Even if his name was theoretically connected to a crime, the prosecution could not rely on testimony that "somebody named Gladden did it." There would have to be an identification based upon eyewitness testimony, fingerprints, a blood sample, a voice identification, handwriting samples, etc.

The correct rule governing custodial interrogation is stated as follows: Interrogation under Miranda refers to any

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[1]Plaintiff admitted that in the present case, providing his name and address would in fact not incriminate him.

words or actions that the police should know are reasonably likely to elicit an incriminating response from the suspect. Rhode Island v. Innis, 446 U.S. 291, 301, 64 L.Ed. 2d 297, 308, 100 S.Ct. 1682 (1980). In Innis the Court held that a conversation between two officers was not interrogation, so the facts are different from the present case where Petitioner was directly asked his name.

Fortunately, there are a number of cases where the Innis rule is applied in the context of questions relating to identification. Questions about a Defendant's address and phone number for noninvestigative purposes of identification were not "interrogation" under Miranda. U.S. v. Sims, 719 F.2d 375 (11th Cir. 1983, cert. denied, 465 U.S. 1034). In Sims, the Court relied

upon U.S. v. Menichino, 497 F.2d 935 (5th Cir. 1974, cert. denied, 406 U.S. 923) where the Court stated that biographical questions asked during booking do not lend themselves to eliciting damaging statements. 497 F.2d at 941.

Similarly, in another case applying the Innis rule, it was held that an officer taking basic personal information such as name, age, and place of birth, is performing a ministerial duty incident to arrest and custody. U.S. v. Morrow, 731 F.2d 233 (4th Cir. 1984, cert. denied, 467 U.S. 1230). Such questions do not constitute "interrogation or its functional equivalent...." 731 F.2d at 237.

In short, in spite of cases as old as Byers (1971) and as recent as Doe (1988) Petitioner has continued to pursue his groundless appeal. Petitioner neither

distinguishes these cases nor straightforwardly asks that these cases be reversed. The real issue in this case may not be whether the decision of the Court of Appeals below should be upheld, but whether sanctions should be imposed on Petitioner.

SECOND REASON FOR DENYING WRIT
(In Reply To Petitioner's Reason III)

There is no need to consider the issue of Petitioner's standing to seek to enjoin enforcement of Article 38.02 because the statute has been amended since his arrest and the statute was never applied illegally to Petitioner.

Petitioner claims standing to attack the old version of Texas Penal Code art. 38.02 by stating that the City has "acknowledged its application" of the

statute to Petitioner and has "expressed its intention to continue to enforce that statute as applied." In an attempt to have writ granted, Petitioner neglects to describe what "application" was acknowledged by the City.

Petitioner admitted that he was asked to identify himself on April 23, 1983, only after being lawfully arrested for Public Intoxication. There was no evidence, and the jury did not find, that City officers had a policy or custom of stopping individuals to determine their identity or arresting and charging individuals solely for failure to identify. For the reasons discussed under the First Reason For Denying Writ, the single booking of Petitioner at the City jail under art. 38.02, was not unconstitutional.

Accordingly Petitioner has no standing to complain of being arrested solely for failing to identify himself when there was no probable cause to believe he had committed a crime - he was never arrested on that basis. Similarly, there is no likelihood that he or any other person will be arrested in Denton solely for failure to identify themselves when there is no probable cause to believe a crime has been committed - the City has no such policy or custom.

In short Petitioner has failed to demonstrate any threat that was "real" and "immediate" rather than "conjectural" that he (or anybody else) would be arrested in Denton solely for Failure To Identify. Golden v. Zwickler, 394 U.S. 103, 109, 22 L.Ed. 2d 113, 118, 89 S.Ct. 956, 960 (1969). Petitioner's single exposure to being asked to identify

himself after being lawfully arrested, does not present a case or controversy justifying injunctive relief, especially where there was no evidence of "continuing, present adverse effects". O'Shea v. Littleton, 414 U.S. 488, 496, 38 L.Ed. 2d 674, 683, 94 S.Ct. 669, 676 (1974).

Even if this Court was in the business of issuing advisory opinions as to how Section 38.02 might be applied in other cities, that issue is now moot. At the time of Petitioner's arrest, the Texas Failure To Identify statute, Tex. Penal Code sec. 38.02, authorized a police officer to require identification from a person who was lawfully stopped. This phrasing could lead to difficulties in interpretation. However, the Supreme Court declined to determine the facial validity of the statute in Brown v.

Texas, 443 U.S. 47, 61 L.Ed. 2d 357, 99 S.Ct. 2637 (1979). The statute was amended effective September 1, 1987. The amended Section 38.02 requires identification only when a person has been lawfully arrested.

Petitioner's requests to declare old Sec. 38.02 unconstitutional, and to enjoin its enforcement, are moot. There is no need to even consider Petitioner's fanciful allegations that he is in danger of being required to identify himself in the future while merely being stopped. Petitioner's claims for declaratory and injunctive relief are nothing but requests for an advisory opinion as to what this Court would have ruled if the statute had not been amended, and an officer of another city happened to arrest Petitioner for failure to identify after an investigatory stop. The

District Court properly declined to issue such an "advisory" injunction, and there is no reason for this Court to consider the issue. See Los Angeles v. Lyons, 461 U.S. 95, 104-105; 75 L.Ed. 2d 675, 685-686; 103 S.Ct. 1660 (1983).

CONCLUSION

For the foregoing reasons, Respondents pray that the Petition For Writ of Certiorari be denied.

Respectfully submitted,

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